COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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	December 8, 2008
In the Matter of	DEP Docket No. 2006-115
	DALA No. DEP-06-939
Robert Zeraschi	Determination of Applicability
	Reading

Final Decision

This appeal involves the interpretation of a particular provision of the regulations to implement the Rivers Protection Act amendments to the Wetlands Protection Act. St. 1996, c. 258; M.G.L. c. 131, s. 40. The issue is whether Lots G and H on Torre Road in Reading, owned by Robert Zeraschi, have a riverfront area. The lots abut Walkers Brook, formerly known as the "Reading Drainage Canal." The more specific question is whether this watercourse is a "manmade canal," and therefore does not have a riverfront area under the regulations. 310 CMR 10.58(2)(a)1.g. The parties have marshalled an impressive array of evidence about the history and characteristics of the watercourse. The Administrative Magistrate concluded that the watercourse is a "river," defined as a "natural flowing body of water that empties into any ocean, lake, pond, or other river and which flows throughout the year." M.G.L. c. 131, s. 40, 310 CMR 10.04 River, 310 CMR 10.58(2)(a)1. She also concluded that the Main Channel section of Walkers Brook is a "manmade canal," so that the Applicant's property does not contain riverfront area. I

accept these conclusions only for these two lots, not for the entirety of Walkers Brook, or as the analysis might apply to other watercourses constructed for drainage or to other manmade watercourses.

Discussion

The term "manmade canal" or "canal" appears nowhere in the Rivers Protection Act or the Wetlands Protection Act and is not a defined term in the regulations. The regulations provide:

> Manmade canals (e.g., the Cape Cod Canal and canals diverted from rivers in Lowell and Holyoke) and mosquito control ditches associated with coastal rivers do not have riverfront areas.

310 CMR 10.58(2)(a)1.g. The origin of this exemption appears to reside in the statutory definition of "riverfront area." The statute states:

> The riverfront area shall not include land now or formerly associated with historic mill complexes including, but not limited to, the mill complexes in the Cities of Holyoke, Taunton, Fitchburg, Haverill, Methuen and Medford in existence prior to nineteen hundred and forty-six and situated landward of the waterside façade of a retaining wall, building, sluiceway, or other structure existing on the effective date of this act. The riverfront area shall not apply to any mosquito control work done under the provisions of [M.G.L. c. 40, s. 5, cl. 36, c. 252, or any special act].

M.G.L. c. 131, s. 40. Thus, the statute provides an exemption from the riverfront area for historic mill complexes and mosquito control, but begs the question of geographic jurisdiction, whether the riverfront area begins at the edge of the river itself or at the edge of any related canals serving the mills or ditches dug to control mosquitoes.

The regulations answer the jurisdictional question by stating more generally that "manmade canals" do not have riverfront areas, including examples, and more specifically that only mosquito control ditches extending from coastal rivers do not have riverfront areas. The examples of "manmade canals" – the Cape Cod Canal and the

Lowell and Holyoke canals, appear to have been selected because they would be familiar to persons using the regulations.[1] Since work on historic mill complexes and mosquito control work are exempt from activity jurisdiction, the consequence of the scope of geographic jurisdiction related to canals and mosquito ditches falls on other types of activities.

The grandfather and exemptions provisions in the regulations are faithful to the statute, with nothing to suggest that the Department intended the term "manmade canals" to apply beyond the circumstances of canals associated with mills and of "manmade canals" which are not rivers, such as the Cape Cod Canal. It is consistent with the wetlands regulations to evaluate the status of a watercourse from the perspective of its present condition, whether it functions at the time of filing as a "man-made canal." The change in status of an artificial channel to a river is an accepted principle of riparian law:

> In Freeman v. Weeks, 45 Much. 335, Judge Cooley said: "If by common consent the ditch was dug as a neighborhood drain and has remained open as a watercourse for a series of years, it ought to be governed by the same rules that apply to other watercourses." It has often been decided both in England and America, that watercourses made by the hand of man may have been created under such conditions that, so far as the rules of law and the rights of the public or of individuals are concerned, they are to be treated as if they were of natural origin. Baron Channell said of one of them, in Nuttall v. Bracewell, L.R. 2 Ex. 1, "It is a natural stream or flow of water, though flowing in an artificial channel."

Stimson v. Inhabitants of Brookline, 197 Mass. 568 (1908). I note that the definition of "river" in the statute and regulations as a "natural flowing body of water" may also refer to watercourses with a natural flow as opposed to a natural channel. Thus, the Department and the Reading Conservation Commission may be correct that the

[1] The Cape Cod Canal clearly does not arise from the statutory exemption and its inclusion here may be incidental.

watercourse at issue here, Walkers Brook (formerly Reading Drainage Canal) is now a river despite its manmade origin as a canal.

Nonetheless, the most relevant definition of "canal" is "an artificial waterway designed for navigation or for draining or irrigating land." Webster's Third New International Dictionary, Canal, n. def. 4 (1993). Walker's Brook fits this definition as to its origin as an artificial drainage channel. Because the term was not defined in the regulations and there are no final decisions from adjudicatory hearings to provide interpretive guidance to the contrary, the Petitioner is entitled to rely on the ordinary meaning of this term. I conclude therefore, that lots G and H on Torre Road in Reading do not have riverfront areas. I make no determination on Walker's Brook in Reading or in neighboring towns, or on other similar drainage channels. I note that case-by-case determinations on the status of watercourses based on the undefined term, "manmade canal" is likely to yield inconsistent results as various interested persons may reach this question: landowners, conservation commissions of different towns through which a watercourse may pass, and between regional offices of the Department. A similar concern led to mapping of the mouths of coastal rivers to how where the riverfront area ends, as directed by a former Commissioner in a Final Decision. See Matter of Notarangelo, Docket No. 2002-021, Final Decision (October 1, 2003). I ask the Wetlands Program to review this question and either by policy or regulation clarify what watercourses, other than the canals and mosquito ditches specified in the statute, if any, should not have riverfront areas.

The parties to this proceeding are notified of their right to file a motion for reconsideration of this Decision, pursuant to 310 CMR 1.01 (14)(d). The motion must be

filed with the Docket Clerk and served on all parties within seven business days of the postmark date of this Decision. A person who has the right to seek judicial review may appeal this Decision to the Superior Court pursuant to M.G.L. c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this Decision.

Laurie Burt
Commissioner